guage: "Unless the votes for an ineligible person are expressly declared to be *void*, the effect of such a person receiving a majority of the votes cast is according to the weight of American authority, and the reason of the matter, * * * that a new election must be held, and not to give the office to the qualified person having the next highest number of votes:" Dillon on Municipal Corp., sect. 135; and Judge COOLEY (also before many of the cases herein cited were decided) states the law without qualification, that "without a plurality no one can be chosen to a public office; and if the person receiving the highest number of votes was ineligible, the votes cast for him will still be effectual so far as to prevent the opposing candidate being chosen, and the election must be considered as having failed:" Const. Limitations 620.

There are a considerable number of legislative precedents on this subject under the usual clause in American constitutions making legislative bodies the exclusive judges of elections of their members. Some of them are cited by Judge STRONG in *Commonwealth* v. *Cluley*, 56 Penna. 270, and others in *Sublett* v. *Bedwell*, 47 Miss. 266, and in the argument of counsel in *People* v. *Clute*, 50 N. Y. The majority of them appear to follow what we have stated as the American rule, but they are by no means uniform, and we have not thought it worth while to cite or review them. In the language of FOLGER, J., in *People* v. *Clute*, "They cannot be said to afford any precise or useful principle, * * * and they are not so conclusive and satisfactory as judicial determinations."

J. T. M.

Court of Appeals of Maryland.

JAMES LEGG ET AL. *v.* MAYOR, &c., OF ANNAPOLIS.

A valid statute can only be passed in the manner prescribed by the Constitution, and when the provisions of that instrument, in regard to the manner of enacting laws, are wholly disregarded in respect to a particular act, it must be declared a nullity, though having the forms of authenticity.

Whenever a question arises in a court of law as to the existence of a statute, or as to the time when it took effect, or as to its precise terms, the judges who are called upon to decide such question, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required.

An Act of Assembly which can be shown by undoubted and competent evidence, never to have passed the two houses of the legislature, substantially, as it was approved by the governor, and sealed with the great seal, and published, is a nullity; and it is the duty of the court so to declare it.

If the answer to an application for a mandamus contains or sets up any sufficient reason for refusing the writ, though it be in other respects evasive and irresponsive, it should not be quashed as a whole.

Where the answer to a petition for a mandamus is quashed, the allegations of the petition are not authorized to be taken *pro confesso;* nor is the judge authorized to enter judgment as by default for want of answer, or by *nil dicit*. The case must be heard *ex parte*, and the mind of the judge satisfied both as to the law and the facts, before the writ can be ordered.

On an application for a mandamus, the right to which depends upon the ques-

tion whether a certain public statute, appearing in the statute book, with all the prescribed forms of authentication, is valid or not, the onus of proof is upon the applicants, with a strong presumption against the right asserted by them; and before that right can be recognised and judicially declared in the face of a public statute, having almost a conclusive presumption in its support, the applicants are bound to furnish the most conclusive evidence of the truth of the facts upon which they rely to invalidate the statute.

It is not competent for parties, though engaged in an adverse litigation, to procure a public statute, affecting the public interest, to be declared a nullity, upon their mere allegations and admissions, as to the manner in which the statute was enacted by the legislature. Proof of a higher and more reliable character should be required in such case.

Mandamus is a writ commanding the *performance* of some act or duty therein specified, in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved or injured. As a preventive remedy simply, it is never used. Its use is confined to those occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

A mandamus does not lie to prevent a person from being disturbed or molested in the exercise of the functions and powers pertaining to his office.

APPEAL from the Circuit Court for Anne Arundel county.

The appellees, by their petition, represented that they were the corporate officers of the city of Annapolis; and in the exercise of their powers as such, they had appointed a police force, which was then in the discharge of its duties.

That the governor had undertaken to appoint the appellants, under the title of "The Board of Police Commissioners for Annapolis City," claiming the right so to do under a pretended law, entitled "An Act to add sub-sections to Article II. of the Code of Public Local Laws, title Anne Arundle County, sub-title Annapolis, to provide a board of Police Commissioners for Annapolis City," chapter 421, which purports to have been approved by the Governor on the 11th of April 1874, in the presence of the Speaker of the House of Delegates and the President of the Senate; and the petitioners charged that said pretended law was not a law, the same never having been passed or approved as required by the constitution of the state of Maryland, to give validity thereto.

They charged that a bill, having for its object the appointment of Police Commissioners for Annapolis City, was introduced in the House of Delegates, at the late session of the General Assembly of 1874, and was passed by the House of Delegates on the 30th of March 1874, and sent to the Senate; that it was reported from a committee of the Senate, on the 3d of April 1874, to the Senate, but that on or about the 6th of April 1874, before any vote had

been taken on said bill by the Senate, it was lost, or mislaid or purloined, and removed from the Senate Chamber, and was never afterwards before the Senate for its action. That after the removal of the said bill had been discovered, a draft of another bill for the appointment of Police Commissioners for Annapolis City was prepared, and upon the said draft of a bill, entries were made, professing to be in conformity with the action of the House of Delegates upon the bill which had been lost or mislaid, &c., and also entries professing to be in conformity with the action of the Senate; that the said draft thus prepared, was presented to the Senate, and the Senate afterwards passed the same by yeas and nays; that the said draft of a bill thus passed by the Senate, was not the bill which had been passed by the House of Delegates, but was different in fact and in its contents therefrom; and that the bill, or draft of a bill, thus passed by the Senate alone, was afterwards submitted to the governor, and was that which it was alleged was approved by him on the 11th of April 1874.

The petitioners filed an authenticated copy of the pretended law, so as aforesaid signed by the governor, and the original draft of a law, which passed the House of Delegates and was, as heretofore charged, lost or mislaid, &c., which original draft of the bill in the envelope now surrounding the same and directed to the Counsellor of the City of Annapolis, was received by him through the post-office of Annapolis, on the 14th of May 1874, but from what source the same was received, was wholly unknown to the petitioners.

The petitioners further charged that the said draft of a bill so passed by the Senate of Maryland, was not signed by the governor of Maryland on the 11th of April 1874, in the presence of the Speaker of the House of Delegates, and the President of the Senate, as was endorsed thereon; and the said draft of a bill was not signed at all by the governor, until Tuesday, the 14th of April 1874, and after the time limited by the constitution of the state of Maryland, for the signing and approving by the governor of bills passed by the General Assembly of Maryland, had expired.

The further facts appear in the opinion.

Henry Aisquith and *Wm. H. Tuck*, for appellants.

J. Wirt Randall, Alexander B. Hagner and *Frank H. Stockett*, for appellees.

The opinion of the court was delivered by

ALVEY, J.—In this case, application was made by the appellees for the writ of mandamus to be directed to the appellants, and upon that application a rule was made requiring the appellants to answer by a named day. The appellants answered, but the answer being regarded as insufficient, was, upon motion of the appellees quashed; and thereupon the appellees moved that judgment be given in their favor, for want of an answer or plea, and that a peremptory writ of mandamus be granted without delay against the appellants. This motion was granted, and the writ ordered to be issued. It is from that order that the present appeal was taken.

The case has been very fully and ably argued, and many questions have been discussed of peculiar interest and nicety; but of the questions presented we propose to decide only those which seem to be leading and controlling in the controversy.

1. Whether any evidence be admissible to show that an act of the last legislature, ch. 421, to provide for the appointment of a board of police commissioners for the city of Annapolis, was not constitutionally enacted, that act having all the forms of authentication prescribed by the constitution?

2. If evidence be admissible for such purpose, whether, after quashing the answer of the appellants, the court below should have heard the evidence to impeach the validity of the statute, instead of taking the allegations of the appellees as confessed for want of answer thereto?

3. And finally, whether the allegations of the appellees, assuming them to have been either confessed or proven, constituted a proper case for the issue of the writ of mandamus?

The determination of these questions would seem to embrace all the material points of controversy between the parties.

1. While the presumption arising from the proper forms of authentication of a statute is very strong that the statute was regularly and constitutionally enacted by the legislature, the authorities maintain that such presumption may be overcome by competent evidence, and the statute be shown to have never been constitutionally enacted. And this court have so decided, in the case of *Berry* v. *The Drum Point Railroad Co.*, 41 Md. 446. A valid statute can only be passed in the manner prescribed by the constitution, and when the provisions of that instrument, in regard to

the manner of enacting laws, are wholly disregarded, in respect to a particular act, it would seem to be a necessary conclusion that the act, though having the forms of authenticity, must be declared to be a nullity. Otherwise the express mandatory provisions of the constitution would be of no avail or force whatever.

In the case to which we have just referred, of *Berry* v. *The Drum Point Railroad Co.*, we decided, adopting the conclusion of the Supreme Court of the United States, in *Gardner* v. *The Collector*, 6 Wall. 499, that whenever a question arises in a court of law as to the existence of a statute, or as to the time when it took effect, or as to its precise terms, the judges who are called upon to decide such questions, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required.

If then it be true, as alleged in the petition of the appellees, that the act in question never in fact passed both houses of the legislature, substantially, as it was approved by the governor, sealed with the great seal, and published, and that fact can be clearly and indubitably established by competent evidence, it follows that the act is a nullity, and the court would have so to declare it.

2. We come now to the second question, that is, as to the proper mode of proceeding upon quashing the answer of the appellants.

The appellants contend that their answer was improperly quashed; that it contained sufficient cause against the issuing of the writ, and though it was evasive in some of its parts, it should not have been quashed as a whole.

According to present practice, as prescribed by the Code, art. 59, the answer to the applicant's petition, filed under rule, stands in the place of the return to the alternative writ under former practice, and it is not required to be more specific or certain in the statement of the defences upon which the defendant relies, than was required in the return to the alternative writ. It was not essential, in order to support the return, that every part of it should be good; it was sufficient if enough was made to appear to constitute a full justification for what was complained of, or a good legal reason why the mandamus should not be issued; and if a return was good in part, and bad in part, the good part could be separated from that which was bad: *Rex* v. *Archbishop of York*,

6 Term Rep. 493; *Rex* v. *Mayor of London*, 3 B. & Adol 268. If therefore the answer in this case contained or set up any sufficient reason for refusing the mandamus, though it was in other respects evasive and irresponsive, it should not have been quashed as a whole.

But assuming, without deciding, that the answer was properly quashed, what was then the proper mode of proceeding, in the absence of an answer. The Code, art. 59, sect. 9, provides that "If the defendant shall neglect to file his answer to the petition by the day named in the order of the judge, after being served with notice thereof, the said judge shall thereupon proceed to *hear* the said motion *ex parte*, within five days thereafter, and if he shall be of the opinion that the *facts and law* of the case authorize the granting of a mandamus as prayed, he shall thereupon, without delay, order a peremptory mandamus to issue;" and by the next succeeding section it is provided, that if the judge shall upon such *ex parte hearing* be of opinion that the facts and law of the case do not authorize the granting of a mandamus, he shall dismiss the petition with costs.

In this case, we think the learned judge below fell into error in supposing that he was required to act upon the allegations of the petition as if they had been confessed, or to assume that they were true, because the appellants had failed to make sufficient answer to them. The statute, according to our understanding of it, does not contemplate such a mode of proceeding. From the very nature of the remedy itself, and the circumstances under which it is ordinarily applied for, it would seem to be proper that the judge should not only be able to see that the application presents a proper case for the issue of the writ, but that the facts upon which the application is based are made to appear with reasonable certainty. Hence, in the absence of an answer, the judge is required to *hear* the case *ex parte;* that is, to allow the applicant to produce his proof, to satisfy the mind of the judge that the allegations of the petition are founded in truth; and if upon such *ex parte* hearing the judge should be of opinion that the *facts and law* of the case authorize the granting of the writ, he orders it to issue, but if not of that opinion he is required to dismiss the petition with costs. The allegations of the petition are not authorized to be taken *pro confesso;* nor is the judge authorized to enter judgment as by default for want of answer, or by *nil dicit*. The case must be

heard, and the mind of the judge satisfied, both as to the law and the facts, before the writ can be ordered.

Here, the question upon which the right depends is, whether a certain public statute, appearing in the statute book, with all the prescribed forms of authentication, is valid or not. By the petition of the appellees facts are alleged, which, if true, and are proven by competent and sufficient evidence, will require the court to declare the statute void. But the question whether a statute has been constitutionally enacted by the legislature cannot be tried upon mere *ex parte* affidavits, nor upon any other than the best and most reliable evidence. As opposed to the allegations of the petition, the statute itself, as published by authority, furnished at least a strong *primâ facie* cause against granting the writ; and of the statute the court was bound to take judicial notice. The *onus* of proof was upon the appellees, with a strong presumption against the right asserted by them, and before that right could be recognised and judicially declared, in the face of a public statute, having almost a conclusive presumption in its support, the appellees were bound to furnish the most conclusive evidence of the truth of the facts upon which they rely to invalidate the statute. It is a question as to the existence of a law, upon which the rights and obligations of the parties, and also of the public, depend, and the inquiry proposed is one addressed exclusively to the judge. It is not a question to be submitted to the jury, but it is the duty of the judge or court, whenever such a question is made, to exact the most convincing evidence, and to declare the statute assailed valid or invalid, as the judicial mind may conclude, upon the evidence produced: *De Bow* v. *The People*, 1 Denio 9.

To allow a public statute to be invalidated and set aside upon the mere allegations of a party, though under oath, as to the manner of its enactment, would be not only an unprecedented proceeding, but one fraught with the most serious consequences. Indeed, the court would not be justified, in such case as this, in taking the admissions or confessions of the defendant as evidence upon which to declare a public statute a nullity. The public are interested in maintaining the statute, and it is not competent to parties, though engaged in an adverse litigation, to procure a public statute, affecting the public interest, to be declared a nullity, upon their mere allegations and admissions, as to the manner in which the

statute was enacted by the legislature. Proof of a higher and more reliable character should be required in such case.

3. The next and last question is, whether the petition of the appellees presented a case proper for the issue of a mandamus; and this question is important to be decided, as upon its decision depends whether the case shall be remanded, or be dismissed, without further proceeding.

According to the allegations of the petition in this case, the appellees are in office exercising all the duties and functions thereof, and the appellants, though appointed to the new office created by the statute of 1874, ch. 421, have not entered upon the duties of that office, and have in no manner interfered with the appellees in the exercise of the office they hold. The appellants are not charged with withholding anything that pertains to the office of the appellees, nor even with exercising powers and privileges that are in conflict with those exercised by the latter. It is alleged that the appellants have been appointed by the governor under the Act of 1874, as Police Commissioners, and that, as the appellees are informed, they have accepted the appointment, or intend to accept the same, "and undoubtedly propose and design, unless restrained from so doing, to exercise all and singular the powers pretended to be conferred on them as a Board of Police Commissioners, by said pretended law." The petition then proceeds to pray that a writ of mandamus may issue to the appellants, "commanding them, and each of them, to surcease and desist from exercising, or assuming to exercise, in any manner, any power or authority or jurisdiction under the said pretended act, by the appointment of any police or otherwise; and further commanding them, and each of them, to abstain from interfering or attempting to interfere, with the police department established by your petitioners, under their said charter and ordinances, and from hindering, obstructing, resisting or opposing, the executive officers of said city, in the exercise of their lawful powers, and in the discharge of their official duties."

This is the usual prayer for an injunction, in a bill in equity, to restrain an unlawful interference with rights; but we are not aware of any precedent for the use of the writ of mandamus to accomplish such a purpose. Mandamus is a writ commanding the performance of some act or duty, therein specified, in the performance of which the applicant for the writ is interested, or by the

non-performance of which he is aggrieved or injured. *Reg* v. *Bishop of Chichester*, 2 Ell. & Ell. 209. But as simply a preventive remedy it has never been used, so far as we have been able to discover. The nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Its use is therefore confined to those occasions where the law has established no specific remedy, and where in justice and good government there ought to be one: 6 Bac. Abr., tit. *Mand.* 418. But there can be no want of remedy for any illegal or improper interference with the exercise of the powers and duties legally pertaining to the office of the appellees.

In the case of *Reg.* v. *Peach*, 2 Salk. 572, a dissenting minister, being qualified to preach under the Toleration Act, and being illegally convicted for the exercise of his right, and supposing that he would be further prevented from exercising his right to preach, except at his peril of abiding a conviction therefor, applied for a mandamus to be permitted to preach. But the writ was denied, and the court held, "that a mandamus is always to do some act in execution of law;" whereas the writ, if issued in that case, would be in the nature of a writ *de non molestando*. And in accordance with this case, Ch. Baron COMYNS, in his Dig., tit. *Mand.* (B.), lays it down as settled, that a mandamus does not lie to prevent a molestation against law. The same principle is stated by Tapping in his work, as the settled law. Tapp on Mand. 189, 190.

Taking this to be an established principle upon the subject, there is no proper case stated in the petition of the appellees to justify the issuing the writ. The application was founded entirely upon an apprehension that the appellees might be disturbed or molested in the exercise of some of the functions and powers that have heretofore belonged, and may still pertain, to their office. To grant the writ in such case, would be simply making it a substitute for an injunction.

We think the petition ought to be dismissed, and we shall therefore reverse the order appealed from, and dismiss the petition with costs to the appellants.

It is the undoubted function of the courts to declare an act of the legislature void which violates any constitutional provision; but it has been contended that those provisions, when they refer to the mode of passing acts, are direc-

tory only. This subject has been discussed at great length by Judge COOLEY in his work on Constitutional Limitations (third ed., pp. 78, 150), and by Mr. Sedgwick (Statutory and Constitutional Law, second ed., p. 316). Their conclusion is that the requirements of the state constitutions in reference to the passing of bills are mandatory; and when the act itself shows that such requirements have not been complied with, as when it has more than one subject, or does not indicate the subject by the title, the courts may declare it unconstitutional. "Constitutions do not usually undertake to prescribe mere rules of proceeding except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations on the power to be exercised. * * * If directions are given respecting the times and modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only:" Cooley on Const. Lim. 78, 79. This reasoning has been generally held conclusive: See *People* v. *Purdy*, 2 Hill 34, 36; *People* v. *Lawrence*, 36 Barb. 188; *Greencastle Township* v. *Black*, 5 Ind. 566; *State* v. *Johnson*, 26 Ark. 281; *Board of Supervisors* v. *Heenan*, 2 Minn. 330. Ohio and California are perhaps the only states whose courts have construed constitutional provisions as directory only: *Miller* v. *State*, 3 Ohio N. S. 475; *Pim* v. *Nicholson*, 6 Ohio N. S. 177; *Washington* v. *Murray*, 4 Cal. 388. The decision in the last case was on the ground of custom, acquiesced in until it had grown into law.

But when the act as attested is not upon its face unconstitutional, there exists a great difference of judicial opinion in the question whether the courts may go behind th formal attestation and hear evidence to ascertain whether the constitutional requirements have been complied with in the passing of the bill. The arguments usually employed against the reception of such evidence are that, in all rules of procedure, the constitution has imposed upon the conscience of the legislature a duty with which the courts have no concern; that the legislature is a co-ordinate branch of the government, and is the final judge as to the manner in which the requirements of the organic law have been complied with; and that great mischief would result from the confusion introduced into our statute law by going behind the formal attestation. It may be noted that the *dicta* on this subject have been more discordant than the decisions, special circumstances in many cases having induced the judges to lay down a rule broader than was necessary for the case in hand. The following subdivisions may tend to harmonize the decisions:—

I. *When the attested Act is impeached by parol only.*—Here the weight of authority is that no inquiry into the mode of passage will be permitted. The dictum in *Gardner* v. *The Collector*, 6 Wall. 499, does not go to the length of receiving unsupported parol evidence; and such evidence has been rejected or pronounced against in *Wheeler* v. *City of Philadelphia*, 1 Weekly Notes 205; *Berry* v. *Balt. & Drum Point Railroad*, 41 Md. 446; *La. State Co.* v. *Richoux*, 23 La. Ann. 743; though it has been received in Pennsylvania to show that the legislature had exceeded its power in granting a divorce for a cause cognizable in the courts: *Jones* v. *Jones*, 2 Jones 350; *Cronise* v. *Cronise*, 4 Smith 262.

II. *Where the legislative journals, kept by the requirements of the organic law, are offered to impeach the Act.*—Here there is a conflict of authority. The decision which most ably presents the conclusive-attestation theory is perhaps in *State ex rel. Pangborn* v. *Young*, 32 N. J. 29, where a mandamus was issued to enforce submission to the authority of the

board constituted by an Act of Assembly. "Does not the legislature," said BEASLEY, C. J., "possess the right of declaring what shall be the supreme evidence of the authenticity of its own statutes? This question, in my opinion, must be answered in the affirmative. The body that passes a law must, of necessity, promulgate it in some form. * * * The power to certify to the public the laws itself has enacted, is one of the trusts of the constitution to the legislature of the state." The argument throughout is an elaborate one, and presents the inconveniences which might attend such inquiries by the judiciary in the strongest light. To the same effect is *Evans* v. *Browne*, 30 Ind. 522, and *Eld* v. *Gorham*, 20 Conn. 8, the latter by a divided court. See also *Green* v. *Weller*, 32 Miss. 650; *People* v. *Devlin*, 33 N. Y. 269; *Duncombe* v. *Prindle*, 12 Iowa 10, 11; *Pacific Railroad* v. *Governor*, 23 Mo. 353.

In a majority of cases the courts have not hesitated to resort to the legislative journals. In Pennsylvania, it was laid down in *Miles* v. *Stevens*, 3 Barr 41, that "the journals of Congress and of the state legislatures are evidence in this country in all public matters;" and *Southwark Bank* v. *Commonwealth*, 26 Penn. State 450, shows that the court may ascertain the intention of the law-making power by the journals. "If the governor should, by mistake, sign a bill which had never been enacted by either house, the journals may be resorted to to correct the mistake." Per LEWIS, J. In South Carolina (*State* v. *Platt*, 2 S. C. N. S. 150), Alabama (*Jones* v. *Hutchinson*, 43 Ala. 722), Illinois (*People* v. *De Wolf*, 62 Ill. 255), Georgia (*Solomon* v. *The Commissioners*, 41 Ga. 157), and Minnesota (*Board of Supervisors* v. *Heenan*, 2 Minn. 330), the journals were consulted to show either that the bill in question had not been read twice, had not been passed by a two-thirds majority, or had not been signed by the executive within the time prescribed by the organic law. The earlier New York cases are to the same effect, and *The People* v. *Devlin*, *supra*, in which they are reviewed, may be considered as overruled by *People* v. *Allen*, 42 N. Y. 378; at least to the extent of deciding that the journals may be consulted to ascertain whether a given bill was passed by a constitutional majority. But the decision in which the jurisdiction of the courts is most amply vindicated is the *Opinion of the Justices*, reported in 35 N. H. 579, upon a case submitted to them by the state legislature. A bill had been passed by the House of Representatives of New Hampshire, amended by the Senate, and so passed, engrossed with the amendment by a joint committee of the houses, signed by their presiding officers, and approved by the governor. The journals of the houses were received in evidence, to show that the amended bill had not been sent back to the lower house, and the justices decided that the act was null and void. "We are of opinion," say the justices, "that the journals which the constitution thus requires * * * to be published annually in the same manner as the public laws, were intended to furnish the courts and the public with the means of ascertaining what was actually done in and by each branch of the legislature; not merely for the purpose of enabling the people to judge of the manner in which their public servants have conducted themselves in their office as legislators, but also for the purpose of determining whether the proceedings of the legislature have been in conformity with the provisions of the constitution; that these journals, under our constitution, are not to be regarded as 'mere remembrances of proceedings,' but as authentic records of proceedings, and that we may resort to them in this case to ascertain whether the two houses, in fact, concurred in the

passage of the before-mentioned act; that if it appears by the journals that they did not, the *primâ facie* evidence derived from an examination of the act itself will be overcome." See also the *Opinion of the Justices*, 45 N. H. 607, and *Gardner* v. *The Collector*, 6 Wall. 499, quoted in the principal case.

In Maryland the courts have assumed an intermediate position. By the constitution of that state every bill must be engrossed after the second reading. In the earlier cases, *Fouke* v. *Fleming*, 13 Md. 392, 412, and *Mayor of Annapolis* v. *Harwood*, 32 Md. 478, where the engrossed and the attested bill agreed, no recourse was allowed to the journals of the houses; but in *Berry* v. *Railroad Co.*, 41 Md. 446, where the engrossed and the attested bill differed, and the latter was contrary to the preamble of the statute, the journals were received in evidence to show that the engrossed bill was that which actually passed the houses. The decision was carefully confined to the exact point; and ALVEY, J., after stating that parol evidence would not be received, adds: "Nor do we decide in this case that the journals of the two houses would be evidence *per se*, upon which the validity of a statute, having the required authentication, could be successfully questioned as to the manner of its enactment. But we think the journals, in connection with other competent evidence on the subject, may be examined as means of information to aid in arriving at a correct conclusion as to what was the action of the legislature on any particular bill before it." The principal case seems to carry the doctrine a step farther, and broadly adheres to *Gardner* v. *The Collector*.

The argument that the legislature is impliedly made the sole judge of the fulfilment of constitutional requisites in the passage of acts does not appear sound. In the absence of any specially organized tribunal, the courts of law are the common forum, and all jurisdiction not reserved by the constitution would seem to belong to them. There is not the slightest hint to the contrary in any state constitution; while, side by side with the provisions which regulate the passing of acts, and often mingled with them in the same section and paragraph, are requirements, obedience to which can unquestionably be enforced in the courts. The legislature is no doubt a co-equal body, but in the sense that it exercises a totally different function. It makes the laws—the judiciary passes upon and interprets them; and the duty of deciding whether a legislative act is constitutioually done appears to be comprised within the judicial sphere. Nor is it any attack upon the dignity of the legislature to decide that a given bill was never passed by that body. In no case will evidence derogatory to the character of the legislature be received: *Jones* v. *Jones*, 2 Jones 357. But the allegation is usually that the bill in question did not pass the houses; that by some error or fraud on the part of ministerial officers the bill was altered on passage or after passage, so that the attested act is not that which was read to the members.

As to the results sometimes predicted from going behind the formal attestation, it may be said that in the states whose courts have taken jurisdiction, no such results have followed. On the contrary, the cases reported have been often of such a kind that a conspicuous failure of justice would have resulted from a refusal to receive evidence dehors the attested statute. *Jones* v. *Jones* and *Berry* v. *Railroad Co.*, *supra*, are here in point. Many cases, on the other hand, in which the courts have declared their inability to go behind the record, could equally have been decided upon the weakness of the evidence: *e. g.*, *Lottery Co.* v. *Richoux*, *supra*. It is conceded that every intendment is to be made in favor of the regular attestation;

and only in flagrant cases, therefore, will an act so attested be impeached. That the judges should deprive themselves of the power to administer relief against the fraud of a clerk or a printer's blunder would be, it is submitted, a public misfortune. The best doctrine seems to be that by which the judiciary reserves to itself a wise discretion. As it is expressed in *Gardner* v. *The Collector*, "Whenever a question arises as to the existence of a statute, or as to the time when it took effect, or as to its precise terms, the judges who are called upon to decide such question have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required."

RICHARD S. HUNTER.

Supreme Court of Missouri.

HAMILTON *v.* MARKS ET AL.

Fraud or illegality in the inception of a negotiable promissory note transferred before maturity, will vitiate the same in the hands of a person having knowledge of the fraud or illegality; and when such fraud or illegality is established, the burden of proof is devolved upon the holder, to show that he took the note in good faith or for value.

But when such note is taken in good faith and for value, the holder is vested with a good title, notwithstanding there may have been circumstances connected with the transfer to him sufficient to put an ordinarily prudent man on inquiry.

PLAINTIFF brought his action upon a negotiable promissory note executed by the defendants to one T. H. Cooley, and by Cooley assigned to plaintiff before maturity. The answer of the defendant set up a conditional sale of a farm to him by Cooley; that the conveyance was made to him for the purpose of making the sale to one Walker, and that the note was executed to secure Cooley in the faithful discharge by Marks of the trust; and that, in case no sale should be made to Walker before the note became due, the same was to be void.

The answer also set up a fraudulent conspiracy between Walker and Cooley to sell the farm to him, and charged the plaintiff with notice of the fraud. It was also averred that no value was given in consideration of the assignment, &c. There was a replication filed by the plaintiff, denying all the material allegations in the answer, and upon the issues thus formed the trial was had. Both parties gave evidence tending to establish their respective sides of the case. There was a verdict for the defendants, upon which judgment was rendered and the plaintiff appealed.